UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

IN RE: SUBOXONE ANTITRUST LITIGATION This Document Relates to: All End Payor Actions	MDL No. 2445 Master File No. 2:13-md-02445-MSG

END PAYOR PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO AMEND END PAYOR PLAINTIFFS' CONSOLIDATED AMENDED CLASS ACTION COMPLAINT PURSUANT TO RULE 15(a) AND 21 OF THE FEDERAL RULES OF CIVIL PROCEDURE

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The End Payor Plaintiffs ("Plaintiffs"), by and through their counsel, respectfully move this Court for leave to amend End Payor Plaintiffs' Consolidated Amended Class Action Complaint pursuant to Rule 15(a) and 21 of the Federal Rules of Civil Procedure. For the reasons set forth below, Plaintiffs respectfully submit this motion should be granted in its entirety.

INTRODUCTION

On December 3, 2014, this Court entered an Opinion granting, in part, and denying, in part, Defendants' motion to dismiss Plaintiffs' Consolidated Amended Class Action Complaint ("Opinion") [Docket No. 97]. Plaintiffs seek leave to file a Second Amended Class Action Complaint ("Complaint"). The proposed amendments do not seek to alter the legal theory in this case. The proposed amendments are as follows:

- Indivior plc ("Indivior") added as a defendant. Indivior is the successor to Defendant Reckitt Benckiser Group plc. Suboxone is a key to Indivior's revenues;[1] and
- More detailed allegations regarding the effects to competition and damages incurred (and continuing to incur) by Plaintiffs.[2]

For the reasons set forth below, Plaintiffs respectfully submit that this motion should be granted in its entirety.

LEGAL STANDARD

A. The Supreme Court and the Third Circuit Require Liberal Amendments

Rule 15(a) of the Federal Rules of Civil Procedure permits amendment of pleadings with leave of court, and directs that courts "should freely give leave when justice so requires." *See*

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[1] SACCAC ¶ 113.

[2] SACCAC ¶ 144-48.

also Foman v. Davis, 371 U.S. 178, 182 (1962) ("leave sought should, as the rules require, be "freely given"). The Third Circuit endorses this liberal view. *See Boileau v. Bethlehem Steel Corp.*, 730 F.2d 929, 938 (3d Cir. 1984); *Dole v. Arco Chemical Co.*, 921 F.2d 484, 486-487 (3d Cir. 1990) ("court[s] should use 'strong liberality' in considering whether to grant leave to amend.") (citations omitted). On a motion for leave to amend pursuant to Fed. R. Civ. P. 15(a), several factors should be considered as to whether: (i) amendment will prejudice the opposing party; (ii) amendment will result in undue delay or is proposed in bad faith; and (iii) the proposed amendment would ultimately be futile**.** *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1413-14 (3d Cir. 1993). The grant or denial of an opportunity to amend lies within the sound discretion of the District Court. *Foman*, 371 U.S. at 182.[3]

B. The Liberal Amendment Standard Applies to the Addition of New Parties

In deciding whether to add or remove a party, this Court is guided by "the same standards of liberality afforded motions to amend pleadings under Rule 15." *Soler v. G&Y, Inc.*, 86 F.R.D. 524, 528 (S.D.N.Y. 1980). Fed. R. Civ. P. 21 provides that "parties may be dropped or added by order of the Court on a motion by any party or its own initiative at any stage of the action and on such terms as are just." *Gilliam v. Addicts Rehabilitation Center Fund*, 05 Civ. 3452(RJH)(RLE), 2006 U.S. Dist. LEXIS 21377 (S.D.N.Y. Apr. 20, 2006); *see also In re Initial Public Offerring Sec. Litig.*, 21 MC 92 (SAS), 2008 U.S. Dist. LEXIS 38768 (S.D.N.Y. 2008). A party should be given leave to amend a complaint to add a new party when justice so requires. *See*, *e.g.*

[3] The standard applicable to motions to amend under Fed. R. Civ. P. 15(d) is essentially the same standard that applies to Fed. R. Civ. P. 15(a). *Masimo Corp. v. Philips Electronics N. Am. Corp.*, No. 09-80-JJF-MPT, 2010 WL 1609899, at *1 (D. Del. Apr. 20, 2010).

Blaskiewicz v. County of Suffolk, 29 F.Supp.2d 134, 137 (E.D.N.Y. 1998). Amendment is permissible where the claims of the new party "involve the same or related factual and legal questions. *Soler v. G&Y, Inc.*, 86 F.R.D. 524, 528 (S.D.N.Y. 1980). "The party opposing such amendment has the burden of establishing that leave to amend would be prejudicial or futile." *Id.* at 137.

ARGUMENT

C. Amendment Poses No Prejudice to Defendants

The proposed amendments will not prejudice Defendants. The Third Circuit has determined prejudice to the non-moving party is the "touchstone" for Rule 15(a) decisions. *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1413-14 (3d Cir. 1993). Prejudice means *legal* prejudice - where the non-moving party will be "unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the . . . amendments been timely." *Johnson v. GEICO Cas. Co.*, 673 F. Supp.2d 244, 251 (D. Del. 2009) (*quoting Deakyne v. Comm'rs of Lewes*, 416 F.2d 290, 300 (3d Cir. 1969) Even where new allegations are asserted in an amendment, if the evidence "required to meet these new allegations is substantially similar to that which was originally required, prejudice does not exist." *Romero v. Allstate Ins. Co.*, 01-3894, 2010 U.S. Dis. LEXIS 76050 (E.D. Pa. Jul. 28, 2010). In order to defeat a motion to amend, a defendant bears the burden of establishing that its ability to defend itself will be seriously impaired or that amendment would otherwise be unjust. *Arthur v. Maersk, Inc.*, 434 F.3d 196, 203 (3d Cir, 2006) ("Only when these factors suggest that amendment would be 'unjust' should the court deny leave."). "If no prejudice is found, then leave normally will be granted." *Fed. Prac. & Proc. Civ.* 2d § 1484 (1990 & 2000 Supp.).

In this case, Defendants cannot fairly claim they will be prejudiced by the proposed amendments. The theory of the case remains the same. The proposed amendments seek only to add an additional defendant–specifically, the successor to Defendant Reckitt Benckiser Group plc that has continued the course of conduct alleged in the complaint—and to further clarify the effects to competition and damages incurred (and continuing to incur) by Plaintiffs. Under these circumstances, there can be and is *no* genuine prejudice to Defendants. Accordingly, Plaintiffs should be granted leave to amend in the absence of any prejudice to Defendants.

D. There Is No Undue Delay or Bad Faith

The proposed amendments do not seek to impose any delay nor are they offered in bad faith. The Third Circuit has held that the mere passage of time does not require that a motion to amend be denied on grounds of delay. *Adams v. Gould, Inc.*, 739 F.2d 858 (3d Cir. 1984). Even if the amendments could have been made earlier, delay alone is, in fact, an insufficient ground to deny leave to amend. *Cornell & Co., Inc. v. Occupational Safety & Health Review Comm'n*., 573 F.2d 820, 823 (3d Cir. 1978). Here, there is no delay. The Court's Opinion on Defendants' motion to dismiss issued on December 3, 2014. Defendant Reckitt Benckiser did not "spin off" its pharmaceutical business to Indivior until December 23, 2014. Additionally, under Rule 15(a), "undue delay" refers to delay in the proceedings, not delay in amending the pleadings. There can be no claim in this case that the proceedings have been or will be delayed give that, as of this filing, Reckitt has not answered the first Amended Complaint, the parties have held no Rule 16 conference or Rule 26(f) conference and the Court has not yet set a discovery schedule or trial date. Plaintiffs' amendments are not made in bad faith or with a dilatory motive. Quite the contrary, this is a good faith effort to provide more detailed damages allegations and join additional appropriate parties.

E. The Proposed Amendments Are Not Futile

The futility exception is also inapplicable. An amendment is futile if "the complaint, as amended, would fail to state a claim upon which relief could be granted." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir. 1997) (citing *Glassman v. Computervision Corp.*, 90 F.3d 617, 623 (1st Cir. 1996)). Here, the proposed amendments concern claims that have previously been addressed by this Court in its motion to dismiss Opinion. Thus, there is no basis to claim the proposed amendments fail to state a cause of action because they would not have survived the motion to dismiss. *Adams*, 739 F.2d at 864. Furthermore, the addition of Indivior as a new defendant is not futile. Reckitt Benckiser Group plc recently spun off its pharmaceuticals business, through a demerger transaction, forming Indivior as a new entity. As alleged in the amended complaint, Indivior "is continuing, the course of conduct that the other Reckitt Defendants began." As further alleged, in a recent press release, Indivior identified the United States market for Suboxone as a key factor in Indivior's revenues, and stated that Indivior's "priority in 2015 is to continue to build the Company's future prospects by: preserving our Suboxone Film leadership position in the United States …" As discussed above, these facts occurred subsequent to the Court's motion to dismiss Opinion and Plaintiffs' last pleading. *See* Fed. R. Civ. P. 15(d) (allowing supplemental pleadings for "any transaction, occurrence, or event that happened after the date of the pleading to be supplemented").

Accordingly, the proposed amendments should be granted in their entirety.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion to amend the pleadings pursuant to Rules 15(a) and 21 of the Federal Rules of Civil Procedure should be granted in its entirety.

Dated: March 6, 2015

Respectfully submitted:

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CERTIFICATE OF SERVICE

I, Steve D. Shadowen, hereby certify that on March 6, 2015, I caused End Payor Plaintiffs' Memorandum of Law In Support of Their Motion to Amend End Payor Plaintiffs' Consolidated Amended Class Action Complaint to be filed with the Court's Electronic Case Filing (ECF) system, which will send a notification of filing to all counsel of record.

/s/Steve D. Shadowen